STATE OF WISCONSIN CLAIMS BOARD

The State Claims Board conducted hearings in the State Capitol, North Hearing Room, Madison, Wisconsin on October 7, 1999, upon the following claims:

Claimant	Agency	Amount
1. Julie Nickel	Department of Corrections	$251.62
2. Madison Metro Electrical	Department of Administration	$56,472.83
3. Garver Feed & Supply	Department of Commerce	$19,507.11
4. Robert & Dorothy Messner	Department of Transportation	$9,926.00
5. City of West Allis	Department of Transportation	$13,785.25
6. City of West Allis	Department of Transportation	$56,300.00
7. Nemec Barningham Foster Care	Department of Health and Family Services	$11,008.66

In addition, the following claims were considered and decided without hearings:

Claimant	Agency	Amount
8. Reuben Johnson & Son, Inc.	Department of Administration	$78,695.10
9. Scott & Faith Fechtmeyer	Department of Revenue	$7,112.20
10. Walworth County	Department of Transportation	$76,150.00

The Board Finds:

1. Julie J. Nickel of Waupun, Wisconsin claims $251.62 for damage to her vehicle at the John Burke Correctional Center (JBCC) where she is employed. In November 1998, high winds blew over a handicapped parking sign, which was anchored in a bucket of cement in the JBCC parking lot. The sign landed on the hood of the claimant's vehicle, causing damage. The claimant states that she does not have insurance coverage for this damage and submits an estimate for $251.62 for repairs to her vehicle. While the claimant's car was parked on JBCC property, the Department of Corrections believes that no state employe negligence led to the damage of her vehicle. The day of the incident was very windy. The amount of cement in the bucket was deemed adequate for the task of keeping the sign upright and had been in the past. The DOC feels that this was an unforeseen act of nature. The DOC believes that JBCC and the state do not and should not act as insurers should damage occur to an employe's car while it is parked at work. The DOC believes that the connection with the employe's business is too remote to justify paying this claim, especially when the state was not negligent. The Board concludes the claim should be paid in the amount of $251.62 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Department of Corrections appropriation s. 20.410 (1)(a), Stats.

2. Madison Metro/Great Lakes Electrical of Arlington, Wisconsin claims $56,472.83 for work allegedly performed over and above a contract price for a project at the State Laboratory of Hygiene. The claimant submitted a bid on the project, which included Paragraph 22, which stated that security equipment would be "work by the State". On January 5, 1998, the claimant received a letter from the General Contractor stating that the security equipment in Paragraph 22 would not be provided by the state. The claimant alleges that they installed a Security Access Control system and that this equipment was not provided for in the original bid and was therefore over and above the contract

price. The claimant requests reimbursement of these additional costs. The Department of Administration states that specification section 16722 Security Access Control of the bid documents clearly states that the contractor is to furnish and install the Security Access Control system as part of the bid. The "security equipment" mentioned in Paragraph 22 is not the same equipment and the DOA believes that the claimant was well aware of this. DOA points to the fact that after being awarded the contract, the claimant submitted an order to Protection Technologies dated 9/12/97 for equipment including the Security Access Control system. After the claimant received the 1/5/98 letter from stating that the "security equipment" in Paragraph 22 had been deleted, they submitted a revised purchase order to Protection Technologies, which did not include the Security Access Control system. DOA points to the fact that, although this revised purchase order was received by Protection Technologies on 1/8/98, the order was backdated to 9/12/97, in an apparent attempt to pass it off as the original purchase order. The DOA believes that the fact that the claimant ordered the Security Access Control system immediately after being awarded the bid and the fact that they submitted shop drawings for the Security Access Control system make it clear that the claimant was aware that this equipment was included as part of the original bid. The DOA believes that the claimant backdated the purchase order and submitted revised shop drawings in an attempt to take advantage of a perceived loophole in the contract language related to the deletion of Paragraph 22. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employes and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles. *Member Main not participating.*

3. Garver Feed & Supply of Madison, Wisconsin claims $19,507.00 for interest costs allegedly incurred because of a delay in processing a Petroleum Environmental Cleanup Act (PEFCA) claim by the Department of Commerce. The PEFCA program provides reimbursement to certain owners of leaking underground petroleum storage tanks for cleanup costs that they incur. The claimants own a site for which they have submitted a number of claims to Commerce under the PEFCA program. The claimants allege that the Department's inadequate processing of one of their claims for reimbursement caused denial of a claim for which they should have been reimbursed. The claimants state that a portion of the claim was denied by Commerce because a copy of a cancelled check was not included with the claim as required under PEFCA. The claimants state that there was a copy of the check in question in the claim preparer's file and believe that if Commerce had simply called the person who prepared the claim, the copy would have been discovered and that portion of the claim would have been approved. The claimants believe that it was the Department's "no call" policy caused the incorrect denial of a portion of the PEFCA claim. Because the claimants did not receive this payment, they state that they had to extend the period of the loan they acquired to cover the cost of the cleanup prior to reimbursement by the PEFCA program. The claimants claim that they have paid $16,427.11 in additional interest on the loan due to the delay and also claim $3,080.00 for estimated additional interest that will be paid until final payment is received. They request reimbursement of these interest costs. The Department points to the fact that the claimant has already settled litigation involving this matter and that settlement provides that it is full and complete. The claimant filed an administrative appeal when the Department denied the PEFCA claim. The Department states that the claimants' attorney proposed a compromise offer, which included withdrawal of the claimants' interest claim related to the denial. The Department also states that at the time of the settlement offer, the claimants' attorney was notified that payment of the settlement would not be made until funds were available. The Department gave an estimated payment date of December 1998 and the settlement payment was made on December 28, 1998, as "a full and complete settlement of all issues raised in the appeal filed November 15, 1996." Finally, even in the absence of this settlement, the Department believes it is not liable for this claim. When the claimant filed the PEFCA claim in 1995, they supplied an invoice in the amount of $21,339.53 and a single cancelled check in the amount of $2,246.24. The Department

states that PEFCA claimants frequently claim only a portion of the charges on an individual invoice, therefore, it was not at all unusual that the canceled check submitted did not cover the entire invoice. The Department's claim reviewer would have had no way of knowing that another cancelled check existed, which was mistakenly not included in the claim. The Department would have had no reason to call the claim preparer looking for another check as the claimant believes it should. Furthermore, if the Department made a call to every claimant whose claim appeared as though it might not be complete, it would cause substantial delays in the processing of PEFCA claim. The check was not included due to the claimants' own error and the state should not be held responsible for that error or for interest costs already covered by a previous settlement. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employes and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles. *Member Albers dissenting.*

4. Robert and Dorothy Messner of Brownsville, Wisconsin claim $9,926.00 for damages to apple trees in their orchard allegedly caused by road salt application to Hwy. 49 by the Department of Transportation. The claimants state that they have 136 trees with damage ranging from complete destruction to 25% loss of production, with the most severely damaged trees occurring in the rows closest to Hwy. 49. The claimants submit a letter from Plant Pathologist and UW Professor Patricia McManus, who concurs with the claimants' assertion that their damage was caused by road salt on Hwy. 49. The claimants state that they have lost thousands of dollars in production losses due to road salt damage since they purchased the orchard in 1980. The Department of Transportation recommends denial of this claim. The claimants have provided the written opinion of UW Plant Pathologist Patricia McManus, in which she concluded that the observed damage to the orchard is consistent with salt damage and therefore must have been caused by road salt. Ms. McManus reports that at the time she visited the orchard she observed "no signs or symptoms indicating that insects or disease were responsible for the decline and death of trees". However her report fails to offer evidence or sampling results in support of this theory. The claimants have submitted production and tax records showing an alleged drop in production and income, however, they have submitted no proof to show that the drop is directly and solely caused by the use of road salt on Hwy. 49. The DOT has a duty to maintain the roadways and remove and control ice and snow as a service to the public. The Department believes that businesses must exercise prudent planting practices when planting fruit trees close to a heavily traveled state highway. In some cases, this may include the planting of a "barrier" of salt tolerant plants or bushes to stop the uncontrolled flow of airborne salt spray from reaching the fruit trees. When the DOT became aware of the claimants' concerns, every attempt was made to reduce the amount of salt used on Hwy. 49 without compromising the safety of the motoring public. Within one mile of the orchard is a business that requires a heavy volume of semi tractor-trailer traffic daily, emphasizing the need for road salt as a safety factor to the public and an aid in maintaining an open road to the business. Discontinuing road salt on Hwy. 49 is not a viable option. The DOT believes that the board should consider the long-term implications of paying this claim and setting a precedent for future annual claims at this site and others around the state. The board recommends that the claim be paid in the amount of $9,926.00 based on equitable principles.

5. The City of West Allis, Wisconsin claims $13,785.25 for damages related to an error made by a DOT employe related to a road improvement project. The project agreement split various costs of the project with the State and the Federal Highway Administration (FWHA) paying 80% and the City paying 20%. When the right-of-way acquisition began, the claimant understood that all state and federal approvals were in place. However, the request for federal authorization of real estate funds was inadvertently never submitted by the DOT. The DOT employe responsible for submitting the authorization forms was apparently seriously ill at the time this oversight occurred. The claimant

proceeded to acquire the necessary right-of-way in good faith and in full compliance of all other state and federal guidelines under the assumption that authorizations were in place. The oversight in federal authorization was discovered when the city attempted to seek reimbursement from FWHA. FWHA has denied the city reimbursement because prior authorization was not received according to their policy. The city requests reimbursement of its real estate costs related to the project, which were incurred due to DOT's error. The DOT recommends payment of this claim. The required request for federal authorization of real estate funds was not submitted due to the illness of a state employe, who has since taken a disability retirement. The error was not discovered until years later, when the city attempted to seek reimbursement. This claim has been fully investigated by the DOT and negligence has been found on the part of a DOT employe. However, it has been determined that the DOT does not have legal authority to directly reimburse the city for these costs. The Department therefore requests that the Claims Board reimburse the claimant for their real estate costs. The board recommends that the claim be paid in the amount of $13,785.25 based on equitable principles.

6. The City of West Allis, Wisconsin claims $56,300.00 for damages related to an error made by a DOT employe related to a road improvement project in the City of West Allis. The project agreement split various costs of the project with the State and the Federal Highway Administration (FWHA) paying 80% and the City paying 20%. When the right-of-way acquisition began, the claimant understood that all state and federal approvals were in place. However, the request for federal authorization of real estate funds was inadvertently never submitted by the DOT. The DOT employe responsible for submitting the authorization forms was apparently seriously ill at the time this oversight occurred. The claimant proceeded to acquire the necessary right-of-way in good faith and in full compliance of all other state and federal guidelines under the assumption that authorizations were in place. The oversight in federal authorization was discovered when the city attempted to seek reimbursement from FWHA. FWHA has denied the city reimbursement because prior authorization was not received according to their policy. The city requests reimbursement of its real estate costs related to the project, which were incurred due to DOT's error. The DOT recommends payment of this claim. The required request for federal authorization of real estate funds was not submitted due to the illness of a state employe, who has since taken a disability retirement. The error was not discovered until years later, when the city attempted to seek reimbursement. This claim has been fully investigated by the DOT and negligence has been found on the part of a DOT employe. However, it has been determined that the DOT does not have legal authority to directly reimburse the city for these costs. The Department therefore requests that the Claims Board reimburse the claimant for their real estate costs. The board recommends that the claim be paid in the amount of $56,300.00 based on equitable principles.

7. Nemec Barningham Foster Care of Ashland, Wisconsin claims $11,008.66 for damages allegedly caused by the failure of the Department of Health and Family Services to adequately oversee Ashland County's handling of the foster parent program. The claimant alleges that he filed a claim for damages caused by his foster child and that Ashland County failed to process the claim in a timely manner, lost receipts, and gave him incorrect information regarding reimbursable amounts for clothing. The claimant also states that Ashland County promised to provide respite care or payment, to pay for mileage, and to pay for damage to the foster child's glasses but did not. The claimant alleges that he contacted the DHFS and asked them to step in and help resolve the dispute with Ashland County but that DHFS personnel repeatedly told him that they had no jurisdiction over Ashland County. The claimant feels that the state should have done something to make Ashland County respond to his complaints and process his damage claims correctly. He requests reimbursement for the following damages: $1489.50 for property damage by foster child, $7932.16 for respite care payment promised by Ashland County, $26.00 for damaged glasses, $200.00 for mileage to take foster

child to counseling, $300.00 for clothing for foster child, $116.00 court costs, $600.00 for telephone bills, $300.00 for photocopies, and $45.00 for postage. The Department of Health and Family Services recommends denial of this claim. The DHFS has reimbursed the claimant $1289.50 for property damage sustained by a foster parent that is caused by a foster child, less a $200 deductible, as provided for under the foster parent insurance program under s. 48.627, Wis. Stats. The DHFS alleges that none of the other damages claimed in this claim may be paid under the foster parent insurance program because they do not constitute bodily injury or property damage covered by the foster parent insurance program as required in s. 48.627 (2m) and (2s). The DHFS believes that there is no basis for the Claims Board to pay these other claimed damages. This claim arises out of foster care services the claimant provided to Ashland County, not the state or the DHFS. The DHFS states that although by statute the legislature has provided for payment of certain claims of both state and county foster parents, there are no other statutory grounds for state liability for county foster parents' claims against the county. Since the claimant provided foster care services for the county, there was no state involvement that could result in state negligence and the DHFS does not believe there is an equity basis for this claim. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employes and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

8. Reuben Johnson & Son, Inc., of Superior, Wisconsin claims $78,695.10 for additional compensation allegedly due in connection with the Bayfield Fish Hatchery Water Supply Project. The claimant states that it submitted a request for a change order for costs incurred in the engineering, fabrication, and installation of concrete weights used to anchor the 30" polyethylene intake line on the project. The claimant believes that the weighting system for the polyethylene pipe was incorrectly and unfairly omitted from the bid plans and specifications and that they are due additional compensation. The claimant alleges that the bid specifications provided by the state's engineering firm clearly indicated that the pipe weights were not mandatory materials bid items but only that they "maybe [sic] considered based on the contractor's method of placement and installation plan." The claimant further alleges that there was nothing in the bid documents indicating the volume and weight of water to be contained within the intake pipe and that they therefore assumed that the intake pipe would be at full volume capacity and contain sufficient weight to eliminate any need for pipe anchors and weights. The claimant states that their detailed plan for the pipe installation contained pipe concrete anchors, which were specifically required by the project engineer and the state following the commencement of construction. The claimant feels that if the state had intended that contractors specifically include pipe weights and anchors within their bid that they should have delineated them as mandatory bid items in the bid documents. The Department of Administration recommends denial of this claim. Polyethylene was not the only acceptable piping material allowed on the Bayfield Fish Hatchery project. The claimant could have chosen from a number of allowable piping materials and manufacturer's anchoring recommendations. The DOA states that Part 2 of Section 02660 of the Project Specifications clearly required that anchors, as per the manufacturer, be used with the polyethylene pipe option chosen by the claimant. The claimant could have used other pipe materials, which did require pipe weights and anchors. The DOA further points out that the project specification also clearly required submittal of a detailed installation plan, including information pertaining to the "size and location of weights" as per the manufacturer recommendations. The pipe weights were called for in the manufacturer's specifications for the polyethylene piping material the claimant chose to use. The DOA believes that if the claimant did not want to use pipe weights and anchors, they should have chosen to use another piping material. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employes and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles. *Member Main not participating.*

years later, when the county attempted to seek reimbursement. This claim has been fully investigated by the DOT and negligence has been found on the part of a DOT employe. However, it has been determined that the DOT does not have legal authority to directly reimburse the county for these costs. The Department therefore requests that the Claims Board reimburse the claimant for their real estate costs. The board recommends that the claim be paid in the amount of $76,150.00 based on equitable principles.

The Board concludes:

1. **The claims of the following claimants should be denied:**

   Madison Metro/Great Lakes Electrical
   Garver Feed & Supply
   Nemec Barningham Foster Care
   Reuben Johnson & Son, Inc.
   Scott & Faith Fechmeyer

2. **Payment of the following amounts to the following claimants is justified under s. 16.007, Stats:**

   Julie Nickel $251.62

The Board recommends:

1. Payment of $9,926.00 to Robert and Dorothy Messner for damages to their orchard.
2. Payment of $13,785.25 to the City of West Allis, Wisconsin for real estate costs.
3. Payment of $56,300.00 to the City of West Allis, Wisconsin for real estate costs.
4. Payment of $76,150.00 to Walworth County, Wisconsin for real estate costs.

Dated at Madison, Wisconsin this 19th day of October, 1999.

Alan Lee, Chair
Representative of the Attorney General

Edward D. Main, Secretary
Representative of the Secretary of Administration

Sheryl Albers
Assembly Finance Committee

Lawrence A. Wiley
Representative of the Governor